Supreme Court, U. S.
FILED
JUN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1920

LEONARD J. EISENBERG,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL A. BRENNER
Attorney for Petitioner
76 Tompkins Street
East Northport, N.Y. 11731
(516) 757-9189

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
May a Federal District Court Judge in ruling on a motion for a Verdict of Acquittal (Federal Rules of Criminal Procedure, Rule 29) reject the testimony of a witness he finds incredible or perjurious; what obligation does the Trial Judge have to advise the Jury of such a finding?	
Should this Court re-examine the rule of UNITED STATES v. GLASSER, 315 U.S. 60, 80 (1942) that on Appeal from a Conviction in a Criminal Case the evidence must be viewed in the light most favorable to the Government?	
May Petitioner be convicted of Conspiring to Violate, and/or Aiding and Abetting a Violation of, 18 U.S.C. §2314 Paragraph 3 without proof beyond a reasonable doubt that he knew that counterfeit checks were being transported IN INTERSTATE COMMERCE?	
Statement of the Case	3
Reasons for Allowing the Writ	7
Conclusion	17

APPENDICES

A — Opinion of the Court of Appeals	A-1
B — Order Denying Reargument	B-1
C — Order Denying Rehearing EN BANC	C-1

TABLE OF CASES AND AUTHORITIES

BURTON v. *United States,* 202 U.S. 344, 373 (1906)	13
FITZGERALD v. *United States,* 29 F. 2d 881 (6th Cir., 1929)	12
HODGE v. *United States,* 13 F. 2d 596 (6th Cir., 1926)	12
PACELLI v. *United States,* 588 F. 2d 360, 365 (2d Cir., 1978)	10
ROCHFORD v. *PENNSYLVANIA CO.,* 174 F. 81, 83-84 (6th Cir., 1909)	13
United States v. *AGURS,* 427 U.S. 97 (1976)	9
United States v. *BARNES et al.,* 77 Cr. 190 (S.D.N.Y.), aff'd._____ F. 2d_____, slip 5585 (2d Cir., 1979)	11
United States v. *FEINBERG,* 140 F. 2d 592 (2d Cir., 1944)	13
United States v. *FEOLA,* 420 U.S. 671 (1975)	16
United States v. *FREEMAN,* 498 F. 2d 569 (2d Cir., 1974)	9
United States v. *GLASSER,* 315 U.S. 60, 80 (1942)	3&12

United States v. *GRASSO*, _____F. 2d_____, slip 5685, 5693 (2d Cir., 1979) 12

United States v. *GRAYSON*, 438 U.S. 41 (1978) 9

United States v. *MASSIELLO*, 235 F. 2d 279, 290 n. 8, 9 (2d Cir., 1956) ..... 8&13

United States v. *MESAROSH*, 352 U.S. 1 (1956) 10

United States v. *NEW BUFFALO AMUSEMENT CORP.*, ____F. 2d_____, slip 2745, 2770-72, 2782-90 (2d Cir., 1979) 16

United States v. *PEONI*, 100 F. 2d 401, 403 (2d Cir., 1938) 17

United States v. *SCANDIFIA*, 390 F. 2d 244, 249 (2d Cir., 1968) ..... 15&16

United States v. *STOFSKY*, 527 F. 2d 237, 246 (2d Cir., 1975) 11

United States v. *TAVOULARIS*, 515 F. 2d 1070, 1074 n.9 (2d Cir., 1975) 16

United States v. *TAYLOR*, 464 F. 2d 240 (2d Cir., 1972) 13

United States v. *TRAMUNTI*, 377 F. Supp. 1 (S.D.N.Y., 1974) 9

United States v. *ZANE*, 507 F. 2d 346 (2d Cir., 1974) ... 9

WARDEN v. *HAYDEN*, 387 U.S. 294, 304 (1967) 13

WASHINGTON v. *United States*, 357 U.S. 348 (1958) 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

No.

LEONARD J. EISENBERG,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner LEONARD J. EISENBERG respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 9, 1979, affirming a judgment of conviction rendered July 13, 1978 in the United States District Court for the Eastern District of New York sentencing petitioner to six months in prison and eighteen months probation on his conviction of violating 18 U.S.C. Secs. 2, 371 and 2314 (interstate transportation of counterfeit checks). Petitioner is on bail pending appeal.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported,

appears in Appendix A hereto. There were no opinions in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1979. A timely petition for reargument with a suggestion of rehearing en banc was denied on April 25, 1979. An order extending the time to file a petition for a writ of certiorari to and including June 24, 1979 was signed on May 15, 1979 by the Hon. Thurgood Marshall, and this petition is filed within that extension of time.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States:

> "No person shall. . . be deprived of life, liberty, or property, without due process of law . . . ."

18 U.S.C. § 2(a):

> "Whoever commits an offense against the United States or orders, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

18 U.S.C. §371:

> "If two or more persons conspire to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

18 U.S.C. §2314 (paragraph 3):

> "Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any . . . counterfeited securities . . . , knowing the same to have been . . . counterfeited . . . shall be fined not more than $10,000 or imprisoned for not more than ten years, or both."

QUESTIONS PRESENTED

1. May a federal district court judge in ruling on a motion for a verdict of acquittal (federal rules of criminal procedure, rule 29) reject the testimony of a witness he finds incredible or perjurious; what obligation does the trial judge have to advise the jury of such finding?

2. Should this court re-examine the rule of *United States* v. *Glasser,* 315 U.S. 60, 80 (1942) that on appeal from a conviction in a criminal case the evidence must be viewed in the light most favorable to the government?

3. May petitioner be convicted of conspiring to violate, and/or aiding and abetting a violation of, 18 U.S.C. §2314 paragraph 3 without proof beyond a reasonable doubt that he knew that counterfeit checks were being transported *in interstate commerce?*

STATEMENT OF THE CASE

With several exceptions to be noted in footnotes, the factual recitation of this case in the opinion of the Court of Appeals is accepted as adequate:

> "Appellant* Eisenberg, a criminal defense attorney, was retained to represent one Isiah Crutch in 1970 with respect to a New York State criminal charge of grand larceny and fraud. Thereafter, Eisenberg represented Crutch in a number of other criminal cases in both state and federal courts. Appellant also developed a close social relationship with Crutch. In 1974 Cruch established and headed an organization which manufactured and passed counterfeit bank checks. Appellant agreed to

*Now "Petitioner".

represent any member of the Crutch organization who got into "trouble" and Crutch agreed to pay all the legal fees involved.

According to the evidence, Eisenberg, was introduced in April 1975 by Robert Lander to Stephen L. Rowe, who had recently been arrested for possession of goods stolen from an interstate shipment. During their meeting in appellant's office, Rowe indicated that he was "into all sorts of different things," to which Eisenberg responded by saying that as an attorney "he had to be very, very careful" but that "given the right situation he would be interested."

In late July, Rowe was told by a criminal associate, Michael Silberberg, that he needed capital to finance the purchase of several million dollars worth of stolen American Express Traveler's checks. On July 24, Rowe telephoned appellant and informed him that he had "something interesting" to discuss with him. Appellant suggested a meeting that night at a "health club" called The Fifth Season. Eisenberg asked Crutch, who was with him during the phone conversation, to join him at the meeting.

Eisenberg and Crutch met Rowe and Silberberg at the door of The Fifth Season, and Eisenberg secured and paid for the admission of the entire party. Introductions were made by first name only. Except for Silberberg, the men disrobed in accordance with club policy; clad in towels, they then proceeded to the club pool. When Silberberg asked why the meeting was held in such a place, appelant said that disrobing would protect against anyone wearing a "wire." To allay appellant's fears, Silberberg opened his shirt and demonstrated that he was not wired.*

*Crutch and Rowe's detailed testimony of the first meeting is completely devoid of any reference to this remarkable incident (Tr. 69-80, 205-208). This "discrepancy" is one of several in this case which, we submit, led the trial judge to find Silberberg's embellished testimony to be unworthy of belief (Tr. 524). See Reasons For Allowing the Writ at Point I.

The Court of Appeals' one-sided recitation of the evidence presumably reflected its viewing of the evidence in the light most favorable to the Government. App. A at 5-6. See Reasons For Allowing the Writ at Point II.

Leaving Crutch and Silberberg to proceed to the pool, Eisenberg and Rowe went to one side and held a brief conversation, in which Eisenberg vouched for Silberberg. Appellant and Rowe then joined Crutch and Silberberg at the pool. In appellant's presence, Silberberg began to detail a proposal for purchasing the stolen American Express Traveler's checks. There was a discussion among all four men concerning the checks, including such topics as how the checks were stolen and possible plans for their disposal in Las Vegas or abroad. Appellant, in particular, inquired about the value of the checks. After about fifteen minutes of conversation about the checks, appellant declared that the deal involved too much risk for too little return and that he was not interested.

Later appellant told Rowe privately that Crutch was big in "paper". The four agreed to meet again at the Fifth Season the following week.

A week later the party returned to The Fifth Season and were admitted at Eisenberg's request. Crutch and Silberberg went off by themselves and discussed the possibility of counterfeiting some stolen bank checks. At the same time, Eisenberg sponsored Rowe and Silberberg for membership at The Fifth Season. After this second meeting was concluded, Crutch told Eisenberg that something might be "cooking."

Finally, on August 7, the group convened once again at The Fifth Season. Crutch and Silberberg went into the club game room and the former laid out a display of counterfeit checks from several banks. Silberberg told Crutch to counterfeit one hundred Bankers Trust checks in the fact amount of $1.75 million for which he would be paid with several genuine stolen checks and $20,000 in cash. Rowe came into the game room at several points during the Crutch-Silberberg conversation and, according to Silberberg's testimony, appellant entered for a moment and commented upon how good a job of counterfeiting had been done. Crutch denied that appellant had seen the counterfeit checks.**

**Rowe also denied that petitioner ever came into the room while this "display" was occurring (Tr. 216-20, 285).

Two weeks later, Eisenberg had a meeting with Rowe and Lander about a pending criminal case against them and Rowe brought appellant up-to-date on the ongoing counterfeiting scheme with Crutch and Silberberg. Eisenberg reminded Rowe that if the matter came up, he had been present acting as Rowe's attorney.*

At the end of August, Crutch, Silberberg and Rowe met at The Fifth Season and delivery of the counterfeit checks was effected. Ninety of these checks with an aggregate face value of $1.615 million were ultimately sold to an FBI undercover agent in Washington, D.C."
(App. A. at 2-5)

Although the taking of testimony had occupied less than three days, the jury deliberated for five days before finding petitioner guilty (Tr. 739-954): during those deliberations, they requested four re-readings of the court's instructions on conspiracy and aiding and abetting, and once reported themeselves deadlocked at one point; they finally delivered a verdict only after a supplemental instruction which counsel contended amounted to a directed verdict of guilty, and which the Court of Appeals charitably described as "not so weighted against the defendant as to be unfair"(App. A. at 11, emphasis added).

*The assertion that "Rowe brought (petitioner) up-to-date on the ongoing counterfeiting scheme with Crutch and Silberberg" is *not* based on Rowe's testimony; he testified only that petitioner had reminded him (Rowe) that petitioner had been at the health club only as an attorney (Tr. 221-23). One Robert Lander had given the testimony about petitioner being "brought up-to-date" (Tr. 398-401); the veracity of this testimony was reduced by Landers's admission that he had previously given a different version of it to the FBI, omitting this incident, and that he had previously told the FBI this meeting occurred a month earlier, before petitioner had even met Silberberg (Tr. 415-16, 435-40). A defense witness also testified that petitioner had been with him at the time Lander said this meeting took place (Tr. 621-29).

REASONS FOR ALLOWING THE WRIT

The foregoing recitation of the trial testimony and the jury deliberation demonstrates that this was an extraordinarily close case deserving of the greatest scrutiny by the Court of Appeals. Unfortunately, it is submitted that the Court of Appeals did not fulfill its obligation and that this Court must grant certiorari to decide several issues of great importance.

1. MAY A FEDERAL DISTRICT COURT JUDGE IN RULING ON A MOTION FOR A VERDICT OF ACQUITTAL (FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 29) REJECT THE TESTIMONY OF A WITNESS HE FINDS INCREDIBLE OR PERJURIOUS; WHAT OBLIGATION DOES THE TRIAL JUDGE HAVE TO ADVISE THE JURY OF SUCH FINDING?

At the close of the Government's case an extended colloquy took place concerning, *inter alia,* the testimony of Michael Silberberg (472-525). In deciding whether the Government had sustained its burden of showing a prima facie case of conspiracy by non-hearsay evidence, the trial court ruled that it would not consider Silberberg's testimony and that it was "reject[ing]" such testimony, at least "in part"; in effect, the court found the testimony to be untrue (524).* The court had previously queried defense counsel as to whether it could refuse to consider Silberberg's testimony on the motion for acquittal (under F.R. Cr. Proc. 29); defense counsel had said he did not believe the court could disregard it but that the court could consider Silberberg's credibility in deciding that motion (Tr. 484-89); ac-

* The full quotation is:
"I have made my own evaluation within this context of the credibility of the government's evidence, and I am bound to say that there are certain aspects of that evidence, and, in particular, the testimony of Mr. Silberberg, which I reject."

cordingly, the court did not consider Silberberg's testimony and denied the motion (Tr. 524-25).** (Furthermore, the prosecutor referred to the testimony throughout his summation (e.g., Tr. 670, 674, 684) as did the Court of Appeals in its opinion (App. A. at 3, 5, 6). Lastly, the jury was never informed of the trial court's partial refusal to credit Silberberg's testimony).

In numerous cases the Second Circuit has ruled that a trial judge may *not* consider the credibility of witnesses in ruling on a motion for acquittal during a jury trial. See, e.g., *United States* v. *MASIELLO*, 235 F. 2d 279, 290 (2d Cir., 1936) (Frank, J., concurring). Petitioner recognizes the delicate legal issues that are involved in the questions of whether a trial judge may determine that testimony is incredible as a matter of law or perjurious and, if so, what the judge's obligations are. It is submitted, however, that this case requires consideration of these issues and the overturning of cases such as *Masiello.**

Silberberg's testimony differed dramatically from that of both Crutch and Rowe with regard to several critical areas of evidence: (1) Silberberg said that when he broached the travelers check deal to Rowe, Rowe said he knew of an attorney who might want to invest in such a deal—Rowe's testimony did not contain this conversation; (2) Silberberg said that when he asked petitioner why they had to disrobe petitioner said it was to pre-

---

**The full quotation is:

> "I turn now to the 29(a) motion: I conceive my function under that rule to be a more limited one. I must accept the evidence and view the evidence giving full play and consideration to the jury's right to accept or reject evidence as credible, and within that context I deny the motion to dismiss under Rule 29(a)."

The trial court stated that it would "set forth the reasons for the Court's rulings at length in written memoranda . . ." (Tr. 525. This was never done.)

*This issue was raised in the Brief and Reply Brief for Appellant as well as in the Petition for Rehearing En Banc; neither in the panel opinion nor in the order denying rehearing en banc was there any direct reference to it. Presumably, it was one of the issues deemed to be "meritless". App. A. at 12.

vent anyone from being wired—Rowe and Crutch's testimony detailing this episode did not refer to this statement; (3) Silberberg said petitioner came into the game room, saw the counterfeit check display, and said it was a "good job"—Rowe and Crutch said petitioner never came into the room. Based on these clear contradictions and fortified by Silberberg's admission that he told the prosecutor he would "give him" petitioner, the lower court rejected at least "part" of Silberberg's testimony, i.e., those portions that embellished and differed from Rowe and Crutch's (523).

It is true that the jury was the ultimate finder of fact here. But we submit that where testimony is blatantly perjurious, as here, the trial judge has an obligation to reject it when considering a Rule 29 motion.

There are numerous situations where a judge must determine the credibility of witnesses. This must be done in pre-trial hearings. See, e.g., *United States* v. *TRAMUNTI*, 377 F. Supp. 1 (S.D.N.Y., 1974) ("John Spurdis is a liar"). It must be done when a trial judge conducts a non-jury trial and makes findings of fact. Fed. Rules Crim. Proc., Rule 23; see, e.g., *United States* v. *FREEMAN*, 498 F. 2d 569 (2d Cir., 1974). It must be done on Rule 33 motions to set aside a jury's verdict. See, e.g., *United States* v. *AGURS*, 427 U.S. 97 (1976); *United States* v. *ZANE*, 507 F. 2d 346 (2d Cir., 1974). It may be done in any number of other miscellaneous proceedings. See, e.g., *United States* v. *GRAYSON*, 438 U.S. 41 (1978) (proper for trial judge to take defendant's "perjury" at jury trial into account at sentencing). And, of course, it was done here, by the very same judge, in determining if a *prima facie* case of conspiracy had been made out.

If a judge has the ability to make credibility determinations in these situations he or she should also have that ability in ruling on motions for directed verdicts of acquittal and should have the concomitant power to disregard perjurious testimony in making such rulings. There is no constitutional impedimient to

this power since the Sixth Amendment does not contain any language limiting fact finding to the jury as does the Seventh Amendment. And the right to trial by jury will not be seriously impaired, if it is impaired at all, by allowing the trial judge this power on the very limited area of clear perjury.*

In *United States* v. *MESAROSH*, 352 U.S. 1 (1956)** this Court ruled that where the testimony of a witness was found to be unreliable a District Court judge had the power to reject it. *Id* at 9. Since the finding of unreliability was made for the first time in the Supreme Court, this Court directly ordered rather than remanding the case for any hearing on the effect of such testimony. The overriding importance of not permitting a criminal conviction to stand if based on perjured testimony is made clear by the following passage:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts." If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> "The untainted administration of justice is certainly

*While it is conceivable the jury might have found appellant guilty even without Silberberg's testimony, that is not the standard for determining error. For, if they considered this testimony then it contributed to their verdict. Since there is no way of knowing how much they did rely on it, it cannot be said beyond a reasonable doubt that the error was harmless, *United States* v. *MESAROSH*, 352 U.S. 1 (1956). The prosecutor also contended that the failure of trial counsel to ask the court to instruct the jury to disregard Silberberg's testimony was a waiver of this issue. There are several answers to this. Firstly, waiver requires a finding of some " 'trial strategy' advantage" (*PACELLI* v. *United States*, 588 F. 2d 360, 365 (2d Cir., 1978)) and none existed here. Secondly, it is our contention that the obligation was on the trial judge to do something *sua sponte*, once he found Silberberg's testimony false. And, thirdly, we ask this Court to review this issue under the plain error rule.

** Cited to the trial court by defense counsel. Tr. 485-86.

> one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124.
>
> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." *Id* at 14.*

Assuming, *arguendo*, that this Court agrees that federal district judges have this power on Rule 29 motions, it must also decide what the judges' duties are in the event of a finding that a witness is not to be believed.

Where, as here, the judge seemingly rejected only parts of a witness's testimony, the jury could be instructed to disregard those portions but consider the rest. In *Unites States* v. *BARNES et al*, 77 Cr. 190 (S.D.N.Y.), aff'd. _____ F. 2d _____, slip 5585 (2d Cir., 1979), District Judge Werker specifically advised the jury that a witness had lied on at least one instance (Tr. 9615); the jury still returned guilty verdicts.

Alternatively the jury could be advised of the trial court's determination and could be told that they could agree or disagree with it.

*The Second Circuit has called Mesarosh a "sui generis" case and has stated that it is "confident that . . . an incredible witness would not have survived . . . post-trial review . . .". *United States* v. *STOFSKY*, 527 F. 2d 237, 246 (2d Cir., 1975). This case demonstrates that *Mesarosh* is *not* an isolated situation. With the increasing use of accomplice and informant witnesses willing, as here, to do anything to "give" a defendant to the government in exchange for money and other inducements, District Courts must have the power to evaluate the testimony of such witnesses and, in extreme cases, reject it altogether.

Lastly, if the evidence was too pervasive, a mistrial or, in the proper case, a directed verdict of acquittal could be entered. See, e.g., *Unites States* v. *GRASSO*, _____F. 2d_____, slip 5685, 5693 (2d Cir., 1979) (*sua sponte* declaration of mistrial, u, on trial judge's determination that witness had perjured himself, based on "manifest necessity" and no bar to re-trial).

I. SHOULD THIS COURT RE-EXAMINE THE RULE OF *UNITED STATES* v. *GLASSER*, 315 U.S. 60, 80 (1942) THAT ON APPEAL FROM A CONVICTION IN A CRIMINAL CASE THE EVIDENCE MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT?

Related to the previous discussion is our contention that this Court grant certiorari to re-examine and either reject or clarify the rule that on appeal the evidence must be viewed in the light most favorable to the Government.*

Although it is one of the most widely referred-to of all legal maxims, a careful analysis will reveal that it is build on a foundation of sand. *United States* v. *GLASSER*, 315 U.S. 60, 80 (1942) is usually acknowledged as the basis for this rule. In that case this Court said:

> "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *MANTON*, 107 F. 2d 834, 839, and cases cited."

Manton merely *says* the same, as do the two cited cases, *HODGE* v. *United States*, 13 F. 2d 596 (6th Cir., 1926) and *FITZBERALD* v. *United States*, 29 F. 2d 881 (6th Cir., 1929). None of these cases contains any *analysis* of this rule, nor, with

*This contention was raised below in the Brief and Reply for Appellant and the Petition for Rehearing En Banc. It was not discussed in the opinion, which merely recited the general rule that "We assess the sufficiency of the evidence by regarding it in the light most favorable to the Government. *GLASSER* v. *United States*, 315 U.S. 60, 80 (1942). App. A. at 5-6).

one exception, does any of the cases cited in *Hodge* and *Fitzgerald*.** The exception is *ROCHFORD* v. *PENNSYLVANIA CO.*, 174 F. 81, 83-84 (6th Cir., 1909). In that *civil* case the court stated the well-known rule that on a motion for summary judgment, and on appeal therefrom, the party against whom the motion is made must be given the benefit of "every fair inference". Without analysis, this rule has been grafted onto the *criminal* law where, it is submitted, it has no legitimate place. Cf. *WARDEN* v. *HAYDEN*, 387 U.S. 294, 304 (1967) (civil property concepts inapplicable to criminal law of search and seizure). Furthermore, whereas the Seventh Amendment says that in *civil* cases "no fact tried by a jury, shall . . . re-examined in any Court of the United States", there is no language to this effect in the Sixth Amendment relating to *criminal* cases. A plausible case, therefore, can be made for permitting an appellate court a broader review of the facts in a criminal case.

Several respected teachers and jurists support this view. The esteemed Judge Jerome Frank suggested such a rule in *United States* v. *MASIELLO*, 235 F. 2d 279, 290 n. 8, 9 (2d Cir., 1956).* Professor Orfield has been advocating such a rule since at least 1939. Orfield, Criminal Appeals in America (1939), 11-12. See, also, Orfield, Appellate Review of the Facts in Criminal Cases, 12 F.R.D. 311 (1952); 3 Orfield, Criminal Procedure Under the Federal Rules, §26:431. And Professor Shapiro has written a lengthy article analyzing the historical evidence and policy considerations; his conclusions are that there is "the necessity of an appellate review of the facts in criminal cases", "that this in no wise means any real impairment of trial

**In fact, one case cited in *Hodge* seems to go the other way. In *BURTON* v. *United States*, 202 U.S. 344, 373 (1906) the Court said "the whole evidence has been subjected to the most careful scrutiny" — language largely inconsistent with viewing the evidence in the light most favorable to the Government.

*Interestingly enough, another suggestion of Judge Frank in that opinion, that the so-called "single test" rule of *United States* v. *FEINBERG*, 140 F. 2d 592 (2d Cir., 1944) be rejected, was accepted by the Second Circuit almost twenty years later. *United States* v. *TAYLOR*, 464 F. 2d 240 (2d Cir., 1972).

by jury" and that "the concept of a factual appeal already exists in, and is not hostile to, the Constitution". Shapiro, Appeal on the Facts and the Federal Judicial System, 34 Ill. L. Rev. of N.W. Univ. 332, 334, 341 (1939).

To the argument that appellate courts are ill-equipped to review testimony from a cold record, there are two brief answers. One is that "Despite the great reliance placed on demeanor evidence by the courts, demeanor may in fact lead the trier of fact astray . . . [because] persons who remember by visual imagery are subjectively more confident that their reproductions are accurate than are verbalizers . . . [who], although generally no less accurate than visualizers, are more hesitant and uncertain in their reproductions and hence do not appear as confident." STEWART, Perception Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 18. The second answer is that appellate courts actually do review contested factual findings and draw inferences contrary to the lower court fact finder. See, e.g., *WASHINGTON* v. *United States*, 357 U.S. 348 (1958). It is submitted that rejection of *Glasser* would make such decisions more understandable and intellectually honest.

Assuming, without conceding, that this Court would not grant certiorari to consider whether *Glasser* should be completely overruled, it should agre to decide whether *Glasser* should be limited and/or clarified.

For example, it could be determined that while the evidence must be viewed on appeal in the light most favorable to the Government as a general rule, there is an exception for patently false testimony; this would not involve federal appellate courts in every question of credibility.* Alternatively, the general rule

*Adoption of this alternative would be of great significance in this case for, without Silberberg's testimony, there is no evidence petitioner knew that Crutch and Silberberg's "deal" involved counterfeit checks rather than some other documents or "paper". This specific knowledge is necessary for a conviction of violating §2314.

could be held only to apply where there was no improperly admitted evidence and/or there were no errors in the trial court's charge. Viewing the evidence in the light most favorable to the Government assumes a fair and proper determination by the jury of guilt beyond a reasonable doubt. If, because of some error at the trial, e.g., an improper charge on knowledge or intent (see Point III), the jury's verdict was not entitled to a presumption of validity, the reason for viewing the evidence in the light most favorable to the Government would disappear.

III. MAY PETITIONER BE CONVICTED OF CONSPIRING TO VIOLATE, AND/OR AIDING AND ABETTING A VIOLATION OF, 18 U.S.C. §2314 PARAGRAPH 3 WITHOUT PROOF BEYOND A REASONABLE DOUBT THAT HE KNEW THAT COUNTERFEIT CHECKS WERE BEING TRANSPORTED *IN INTERSTATE COMMERCE?*

This indictment charged petitioner with conspiring to transport, and aiding and abetting the transportation of, counterfeit checks *in interstate commerce.* There was no testimony petitioner knew that the "paper", whatever its character, was to be transported in interstate commerce. The trial court refused to charge that this element of knowledge was necessary for a conviction. The Court of Appeals agreed: "The element of interstate transportation is merely a jurisdictional element, for which proof of the fact of transportation is proof enough." App. A. at 7.

Three reasons exist for the granting of a writ of certiorari on this issue:

1. In *United States* v. *SCANDIFIA*, 390 F. 2d 244, 249 (2d Cir., 1968) it was stated:

> "In the absence of some evidence that Scandifia intended, knew or could reasonably have foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury

> would have been justified in concluding that he did more than provide others with the opportunity to do that which the law forbids. And, to provide an opportunity would not seem *ipso facto* to brand one as a causer."

Despite the attempt of this panel to distinguish this case from *United States* v. *SCANDIFIA*, 390 F. 2d 244 (2d Cir., 1968), see App. A. at 7, n. 2, there is a clear intra-Circuit conflict on this issue.*

2. The Court of Appeals cited *United States* v. *FEOLA*, 420 U.S. 671 (1975) as support for its contention that knowledge of interstate transportation was not an element of a violation of §2314. App. A. at 8.

We concede that under *Feola* there is no requirement that petitioner have *intended* that interstate commerce be involved. But *Feola* neither considered nor resolved the issue of whether *knowledge* of what is also a so-called "jurisdictional element" is required when that knowledge is an element of the substantive crime. This Court should grant the writ to determine the parameters of *Feola*. See, e.g., *United States* v. *TAVOULARIS*, 515 F. 2d 1070, 1074 n. 9 (2d Cir., 1975) (*Feola* cited as *support* for holding that where element of knowledge is necessary for conviction of substantive offense it is also necessary for conspiracy conviction); *United States* v. *NEW BUFFALO AMUSEMENT CORP.*, _____ F. 2d _____, slip 2745, 2770-72, 2782-90 (2d Cir., 1979) (Judge Oakes concurring and Judge Mansfield dissenting on the issue of whether knowledge of interstate commerce is necessary in an 18 U.S.C. §1462 prosecution).

3. Assuming *Feola* relegates interstate commerce to a "jurisdictional element", such a reading of that case raises serious due process issues. Knowledge or reasonable foreseeability of all the elements of a crime is required by the "notice" aspect of the Due Process Clause. In the area of conspiracy law that means

*A Petition for Rehearing En Banc, raising this precise conflict, was denied.

that "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement *as he understands it*". *United States* v. *PEONI*, 100 F. 2d 401, 403 (2d Cir., 1938) (emphasis added).

This consideration was not discussed in *Feola* and if it was implied in that decision, it should now be made explicit.

CONCLUSION

FOR THE ABOVE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

JOEL A. BRENNER
Counsel for Petitioner
76 Tompkins Street
East Northport, N.Y. 11731
(516) 757-9189

June , 1979

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 410—August Term, 1978.

(Argued December 1, 1978 Decided March 9, 1979.)

Docket No. 78-1275

UNITED STATES OF AMERICA,

Appellee,

—against—

LEONARD J. EISENBERG,

Appellant.

Before:

MOORE, FRIENDLY and GURFEIN,

Circuit Judges.

Appeal from a judgment entered in the District Court for the Southern District of New York, Charles S. Haight, Jr., *Judge,* convicting appellant on counts of conspiracy to transport counterfeit securities and transportation of same in interstate commerce. The Court of Appeals rejected challenges to, among other things, (1) the sufficiency of the evidence, (2) the admission of certain out-of-court statements, and (3) the charge to the jury.

Affirmed.

JOEL A. BRENNER, East Northport, N.Y. (Edward Chikofsky, New York, N.Y., Helene Freeman, New York, N.Y., and Albert J. Krieger, Miami, Florida, of counsel), *for Appellant.*

PAMELA ROGERS CHEPIGA, Assistant United States Attorney, Southern District of New York (Robert B. Fiske, Jr., United States Attorney, and Robert J. Jossen, Assistant United States Attorney, Southern District of New York, of counsel), *for Appellee.*

GURFEIN, *Circuit Judge:*

This is an appeal from a judgment of conviction in the District Court for the Southern District of New York (Hon. Charles S. Haight, Jr.), for conspiracy to transport counterfeit checks in interstate commerce, and for aiding and abetting the transportation, in violation of 18 U.S.C. §§ 2314, 371 and 2.[1]

Appellant Eisenberg, a criminal defense attorney, was retained to represent one Isiah Crutch in 1970 with respect to a New York State criminal charge of grand larceny and fraud. Thereafter, Eisenberg represented Crutch in a number of other criminal cases in both state and federal courts. Appellant also developed a close social relationship with Crutch. In 1974 Crutch established and

1 Appellant was sentenced on the conspiracy count to a term of imprisonment of two years, with the execution of the prison sentence to be suspended after six months and the remaining eighteen months to be served as a probationary period. On the substantive count imposition of sentence was suspended and appellant was placed on eighteen months' probation to run concurrently with the probation period under Count One.

headed an organization which manufactured and passed counterfeit bank checks. Appellant agreed to represent any member of the Crutch organization who got into "trouble" and Crutch agreed to pay all the legal fees involved.

According to the evidence, Eisenberg was introduced in April 1975 by Robert Lander to Stephen L. Rowe, who had recently been arrested for possession of goods stolen from an interstate shipment. During their meeting in appellant's office, Rowe indicated that he was "into all sorts of different things," to which Eisenberg responded by saying that as an attorney "he had to be very, very careful" but that "given the right situation he would be interested."

In late July, Rowe was told by a criminal associate, Michael Silberberg, that he needed capital to finance the purchase of several million dollars worth of stolen American Express Traveler's checks. On July 24, Rowe telephoned appellant and informed him that he had "something interesting" to discuss with him. Appellant suggested a meeting that night at a "health club" called The Fifth Season. Eisenberg asked Crutch, who was with him during the phone conversation, to join him at the meeting.

Eisenberg and Crutch met Rowe and Silberberg at the door of The Fifth Season, and Eisenberg secured and paid for the admission of the entire party. Introductions were made by first name only. Except for Silberberg, the men disrobed in accordance with club policy; clad in towels, they then proceeded to the club pool. When Silberberg asked why the meeting was held in such a place, appellant said that disrobing would protect against anyone wearing a "wire." To allay appellant's fears, Silberberg opened his shirt and demonstrated that he was not wired.

Leaving Crutch and Silberberg to proceed to the pool, Eisenberg and Rowe went to one side and held a brief conversation, in which Eisenberg vouched for Crutch as a "worthwhile person" and Rowe, in turn, vouched for Silberberg. Appellant and Rowe then joined Crutch and Silberberg at the pool. In appellant's presence, Silberberg began to detail a proposal for purchasing the stolen American Express Traveler's checks. There was a discussion among all four men concerning the checks, including such topics as how the checks were stolen and possible plans for their disposal in Las Vegas or abroad. Appellant, in particular, inquired about the value of the checks. After about fifteen minutes of conversation about the checks, appellant declared that the deal involved too much risk for too little return and that he was not interested.

Later appellant told Rowe privately that Crutch was big in "paper." The four agreed to meet again at The Fifth Season the following week.

A week later the party returned to The Fifth Season and were admitted at Eisenberg's request. Crutch and Silberberg went off by themselves and discussed the possibility of counterfeiting some stolen bank checks. At the same time, Eisenberg sponsored Rowe and Silberberg for membership at The Fifth Season. After this second meeting was concluded, Crutch told Eisenberg that something might be "cooking."

Finally, on August 7, the group convened once again at The Fifth Season. Crutch and Silberberg went into the club game room and the former laid out a display of counterfeit checks from several banks. Silberberg told Crutch to counterfeit one hundred Bankers Trust checks in the face amount of $1.75 million for which he would be paid with several genuine stolen checks and $20,000 in

cash. Rowe came into the game room at several points during the Crutch-Silberberg conversation and, according to Silberberg's testimony, appellant entered for a moment and commented upon how good a job of counterfeiting had been done. Crutch denied that appellant had seen the counterfeit checks.

Two weeks later, Eisenberg had a meeting with Rowe and Lander about a pending criminal case against them, and Rowe brought appellant up-to-date on the ongoing counterfeiting scheme with Crutch and Silberberg. Eisenberg reminded Rowe that if the matter came up, he had been present acting as Rowe's attorney.

At the end of August, Crutch, Silberberg and Rowe met at The Fifth Season and delivery of the counterfeit checks was effected. Ninety of these checks with an aggregate face value of $1.615 million were ultimately sold to an FBI undercover agent in Washington, D.C.

Appellant contends that (1) there is insufficient evidence to support the verdict; (2) prejudicial hearsay was erroneously admitted; and (3) the charge was erroneous. He also asserts that the denial of his motion for a new trial was erroneous.

The Government contends that the evidence established that appellant participated in the scheme in at least three significant ways: first, he brought the parties together and vouched for their reliability and effectiveness; second, he provided a "safe haven" where the scheme was conceived and executed; and third, he expected a share of the profits. Crutch, Rowe and Silberberg each testified for the prosecution.

Sufficiency of the Evidence.

We assess the sufficiency of the evidence by regarding it in the light most favorable to the Government. *Glasser*

v. United States, 315 U.S. 60, 80 (1942); *United States v. Ruffin,* 575 F.2d 346, 353-54 (2d Cir. 1978).

Appellant's theory is that, though he was present at the club while Crutch, Rowe and Silberberg conspired to sell counterfeit checks, he was not himself a participant in those meetings, but only attended at the club, at least initially, in his capacity as attorney for Rowe, one of the participants. Thus, he contends that he neither performed any act in furtherance of the conspiracy nor possessed sufficient knowledge of what his companions were planning to be deemed a co-conspirator or aider and abettor.

There was ample basis to find that appellant had knowledge of the conspiracy's purpose, including testimony that he saw sample checks and acknowledged them to be counterfeit; indeed, evidence was offered to show that Eisenberg made conscious attempts to avoid entanglement in the discussions he had fostered, as by making a point of insisting that he was present at The Fifth Season as Rowe's counsel. The evidence produced at trial, moreover, permits the conclusion that appellant did play a role in the conspiracy. The jury could well have found that Eisenberg brought together the various members of the conspiracy, vouched for their reliability, *e.g., United States v. Tramunti,* 513 F.2d 1087, 1109 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975), and facilitated their use of The Fifth Season as a "safe haven," *United States v. Terrell,* 474 F.2d 872, 875 (2d Cir. 1973), for the planning and promotion of the conspiracy. These facts were sufficient to allow the jury to determine that appellant played host to the conspiracy and associated himself with it. *See also United States v. Calabro,* 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); 405 U.S. 928 (1972).

Building his argument on *United States v. Tavoularis,* 515 F.2d 1070 (2d Cir. 1975), appellant argues ingeniously that failure to prove that appellant knew specifically that the counterfeit checks were to be transported in *interstate commerce* was fatal to the prosecution case. In *Tavoularis,* the prosecution, under 18 U.S.C. § 2113(c), was for possession of securities "knowing the same to have been [illegally] taken from a bank." The court held, "[i]t is clearly an essential element of a crime under that statute that the defendant had knowledge that the property he possessed was stolen *from a bank.*" 515 F.2d at 1074 [emphasis in original].

In the statutory provision involved upon this appeal, however, there is no additional requirement of knowledge except that the securities transported were "falsely made, forged, altered, or counterfeited." 18 U.S.C. § 2314. The element of interstate transportation is merely a jurisdictional element, for which proof of the fact of transportation is proof enough. *United States v. Tannuzzo,* 174 F.2d 177, 180 (2d Cir.), *cert. denied,* 338 U.S. 815 (1949); *see United States v. Cowden,* 545 F.2d 257, 263 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977). Indeed, this court repeatedly has refused to find knowledge of the jurisdictional fact to be an essential element in prosecutions under other statutes as well which parallel the elements of § 2314. *See e.g. United States v. Viruet,* 539 F.2d 295, 297 (2d Cir. 1976) (per curiam); *United States v. Green,* 523 F.2d 229, 233-34 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976).[2]

---

2 Nor is *United States v. Scandifia,* 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds sub nom. Giordano v. United States,* 394 U.S. 310 (1969), to the contrary. In *Scandifia,* the appellant, who had been charged as a principal and not as a co-conspirator, argued that others with whom he dealt on an arms-length basis caused the interstate transportation. He acknowledged that *Tan-*

It being clearly established that requisite knowledge was proved for conviction of the substantive offense, it now follows that the same knowledge is enough as well to establish the conspiracy to commit the substantive offense. *United States v. Feola*, 420 U.S. 671 (1975). The requirement of *mens rea* as an element in the substantive offense makes it the kind of offense that requires no further element of additional knowledge of the jurisdictional fact to make out the conspiracy. *Id.*

Hearsay Testimony

Appellant argues that the admission of three types of hearsay evidence requires reversal notwithstanding the lack of objection by trial counsel.[3] The hearsay consists of: (1) "background" testimony, defined as the April 1975 conversation between appellant and Rowe in appellant's office; (2) so-called pre-conspiracy statements, asserted by appellant to be all conversations which occurred before August 7, 1975; and (3) prior statements of alleged non-conspirator witnesses, defined by the appellant as the testimony of Rowe, Lander and Silberberg.

1. In April 1975, Eisenberg told Rowe that as an attorney he had to be "very, very careful", but that "given the

nuzzo permitted holding one confederate or aider and abettor liable for interstate transportation of counterfeit securities by another confederate or by the principal. *See United States v. Scandifia*, No. 31705, Appellant's Reply Brief 1-3. Hence, both *Tannuzzo* and the instant case are distinguishable from *Scandifia*. Beyond that the *Scandifia* dictum seems inconsistent with what was later decided in *United States v. Blassingame*, 427 F.2d 329 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971).

3 The only hearsay objection made by appellant's counsel was the standard one that co-conspirator's statements were being taken "subject to connection." Judge Haight held such evidence admissible under *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

right situation" he might be "interested." This was not only a prelude to the conspiracy which was later to be more circumscribed in nature, but it was an admission of intention by the defendant which is outside the hearsay rule. Rule 801(d)(2)(A) of the Federal Rules of Evidence.[4]

2. Appellant also contends that the conspiracy began no earlier than August 7, 1975, so that much of the testimony regarding discussions before that date would be inadmissible hearsay. He did not ask Judge Haight to fix a starting date for the conspiracy, and Judge Haight did not do so in his *Geaney* ruling. However, the conspiracy may be said to have begun on July 24, 1975 when Rowe telephoned appellant, said he had something interesting to discuss and set up the first meeting at The Fifth Season. Rowe's statements at the meeting were in furtherance of the conspiracy then beginning to take more definite shape. There were no other significant pre-July 24 conversations.

3. Appellant contends further that Rowe, Silberberg and Lander were not co-conspirators but Government informants and that any hearsay declarations attributed to them could not be admitted as being in furtherance of the conspiracy. If these people were, indeed, *acting* as Government informants throughout the alleged conspiracy, their declarations could not be admitted on a theory of

4 Appellant also argues that Judge Haight erred in denying appellant's motion to strike Rowe's testimony concerning this conversation on the ground that its prejudicial effect outweighed its probative value. Judge Haight had sustained an objection made on a similar ground to testimony of Lander who would have testified that Rowe's and appellant's remarks occurred in the context of a discussion of appellant's possession of stolen office equipment. Judge Haight deemed Rowe's testimony less prejudicial because it did not portray Eisenberg as a recipient of stolen property. We see no reason to disturb this ruling.

agency. *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965); *see United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977).

The difficulty with appellant's argument, however, is that both Silberberg and Rowe, although at times they acted as informants in other matters, did not act as informers in the course of this conspiracy. They were not agents for the Government but were off on a frolic and detour for their own private profit. Indeed, defense counsel at trial recognized that Rowe was in fact an accomplice. And Silberberg was indicted and convicted for participating in this very scheme and was sentenced to a term of imprisonment therefor. *United States v. Silberberg*, 573 F.2d 1299 (2d Cir. 1977) (table), *cert. denied*, 435 U.S. 953 (1978). He testified that he did not tell the FBI about this "paper" scheme. As to Lander, none of his own out of court hearsay statements were admitted.

Charge to the Jury

Appellant attacks the charges to the jury given by the trial court with respect to the elements of conspiracy and of the substantive offense and with respect to "conscious avoidance" as knowledge. He further contends that a supplemental charge delivered in response to a note from the jury was improper because it contained references outside of the scope of the jury's request.

We do not find the initial charge on the elements of conspiracy—and, specifically, on the requirement of knowledge—to be either incorrect on the law or so confusing as to require reversal. The charge relating to the four elements of the substantive crime was correct. Appellant claims error, however, on the ground that the trial judge charged that it was not required that the Government

prove that the defendant—indicted for aiding and abetting—personally performed "each *act* necessary" to satisfy these four elements [emphasis added]. We do not agree that this misled the jury into believing that the *state of mind* of a principal could be imputed to the appellant; the charge as a whole made it clear that defendant's personal knowledge would have to be proved. Furthermore, even if Judge Haight could have been clearer on this point, no objection was taken.

The charge on conscious avoidance was, as we noted earlier, warranted by the evidence and was adequately balanced. The judge made the jury aware of "'countervailing considerations.'" *United States v. Morales*, 577 F.2d 769, 774 & n.4 (2d Cir. 1978).

Finally, the supplemental charge in response to the jury's note, though it perhaps went into greater detail than was strictly required by the jury's request, was properly responsive and not so weighted against the defendant as to be unfair.

Denial of Motion for a New Trial

Our reading of the trial judge's statement in connection with his denial of appellant's motion for a new trial does not indicate to us that he applied the wrong legal standard in exercising his discretion under Fed.R.Crim.P. 33.

We reject appellant's other contentions as meritless without further comment.

For these reasons, the judgment below is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-nine.

Present:
HON. MURRAY I. GURFEIN
HON. LEONARD P. MOORE
HON. HENRY J. FRIENDLY
Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

LEONARD J. EISENBERG,

Defendant-Appellant.

78-1275

A petition for a rehearing having been filed herein by counsel for the appellant Leonard J. Eisenberg

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-nine.

United States of America,

Plaintiff-Appellee,

v.

LEONARD J. EISENBERG,

Defendant-Appellant.

78-1275

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Leonard J. Eisenberg, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN